

NARAYASAMY v. PUBLIC PROSECUTOR[A.Cr.J. (Ong Hock Sim J.) December 29, 1967]
[Penang — Criminal Appeal No. 54 of 1967]*Criminal Procedure — Sentence — Inadequacy of — Power of magistrate — Courts Ordinance, 1948, s. 87(2).*

The appellant was charged for theft under section 379 of the Penal Code. He pleaded guilty, and was sentenced to twelve month's imprisonment to be followed by one year's police supervision. The appellant had had twenty-two previous convictions. The magistrate, in his grounds of judgment, expressed the view that considering the accused's previous convictions, the appropriate sentence should have been one of three years' imprisonment, but that the decision in *Hitam v. Public Prosecutor* (1) had precluded him from exercising his powers under section 87(2) of the Courts Ordinance, 1948, and imposing the appropriate sentence. On appeal against the conviction and sentence,

Held, dismissing the appeal: a magistrate has power under section 87(2) of the Courts Ordinance, 1948 to impose a sentence in excess of that prescribed by section 87(1), where in view of the circumstances of the case, the sentence prescribed by that section is considered to be inadequate.

The sentence of twelve months' imprisonment was accordingly substituted to one of three years' imprisonment.

Case referred to:—

(1) *Hitam v. Public Prosecutor* [1963] M.L.J. 224.

MAGISTRATE'S CRIMINAL APPEAL.

Appellant in person.

Haji Suhaimi bin Kamaruddin (Deputy Public Prosecutor) for the respondent.

Ong Hock Sim J. (delivering oral judgment): In this case the accused was charged under section 379 of the Penal Code with theft of a bicycle. He pleaded guilty to the charge and the learned magistrate sentenced him to 12 months' imprisonment to be followed by one year's police supervision. The accused appealed against conviction and sentence.

The magistrate mis-read the judgment of Hashim J. in *Hitam v. Public Prosecutor*. (1) In that case the judge stated that if the magistrate felt his powers are inadequate he should transfer the case to the sessions court. The learned magistrate in that case exercised the powers of a president and sentenced the accused to 3 years imprisonment without so transferring the case to the sessions court. Section 87(2) of the Courts Ordinance however permits a magistrate to sentence an accused beyond his normal term. It reads:—

"Notwithstanding the provisions of sub-section (1), where a first class magistrate has convicted any person and it appears that, by reason of any previous conviction or of his antecedents, a punishment in excess of that prescribed by sub-section (1) of this section should be awarded then such first class magistrate may award the full punishment authorised by law for the offence of which such person has been convicted and shall record his reason for so doing."

This sentence is subject to confirmation by the High Court.

A Clearly the magistrate should not have hesitated to invoke section 87(2) in this case. He stated in his grounds of judgment:—

"Having regard to all the circumstances of the offence, and the accused, and the circumstances of his previous convictions I am of the view that the sentence of one year's imprisonment in the present case though not wrong, is rather inadequate. The appropriate sentence would have been a sentence of three years' imprisonment, which I had desisted from imposing under the provisions of section 87(2) of the Courts Ordinance, 1948, solely because of the judgment of Hashim J. in *Hitam v. Public Prosecutor*."

B I am of the opinion that the magistrate has misconstrued that particular case. I am therefore going to exercise the power which he clearly had under section 87(2). The accused had 22 previous convictions from 1933, eighteen of which are for theft, and he had been in jail practically the whole of his adult life and had shown little regard for property rights of his fellow men.

D Accordingly I substitute the order of 12 months' imprisonment to one of 3 years' imprisonment.

Sentence enhanced.

E SAFETY INSURANCE CO. LTD. v. HUA SENG ELECTRIC CO.

[A.C.J. (Ali J.) February 12, 1968]

[Johore Bahru — Civil Appeal No. 3 of 1966]

F *Practice and Procedure — Judgment in default of appearance at trial — Setting aside — Reason for absence not shown — Party not entitled to have it set aside — Subordinate Courts Rules, 1950, O. 19 r. 3(3) — Road Traffic Ordinance, 1958, s. 80(1).*

G The respondents brought this action in a magistrate's court to enforce a judgment they had obtained in an earlier action against the appellant insurance company by virtue of a right claimed under section 80(1) of the Road Traffic Ordinance, 1958. As the appellant failed to appear at the trial the respondents obtained a judgment in default of appearance. The appellant subsequently applied to have the default judgment set aside but the magistrate who heard the application dismissed it on the ground that the appellant failed to satisfy him that there was good reason for the absence at the trial. The appellant appealed against the decision of the magistrate.

H Held, dismissing the appeal: (1) before a judgment in default of appearance at trial could be set aside the party in default must show: (i) there was a good defence to the action and (ii) as required by O. 19 r. 3(3) of the Subordinate Courts Rules, 1950, there was good reason for such absence. In view of the express provisions of this rule it was not right to apply the practice adopted by the High Court in a similar matter;

I (2) on the facts of this case the appellant failed to show good reason for the absence at the trial.

MAGISTRATE'S CIVIL APPEAL.

N. Ramachandran for the appellant.

Kamil Suhaimi for the respondent.